

INTHEUNITEDSTATESDISTRICTCOURT  
FORTHEEASTERNDISTRICTOFPENNSYLVANIA

<b>CHARLESJ.GREENLEAF,JR., AlternativeExecutoroftheEstateof CHARLESJ.GREENLEAF,SR.,Deceased andNAOMIGREENLEAF,inherown right, Plaintiffs, v.  GARLOCK,INC.,etal., Defendants.</b>	<b>CIVILACTION  No.90-1557</b>
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**ORDERANDMEMORANDUM**

**ANDNOW**, thisdayof,1997,uponconsiderationofPlaintiffs'  
MotionforDamagesforDelayPursuanttoCivilRuleofProcedure238,asamendedNovember  
7,1988,andtheresponsesthereto,itishereby **ORDERED**thatthesaidmotionis **GRANTED**.  
TheCourtherebyawardsdamagesunderPa.R.Civ.P.238intheamountof\$135,433.22.

Rule238isconsideredsubstantivefor Eriepurposes. Kirkv.RaymarkIndustries,  
Inc.,61F.3d147,168(3dCir.1995); Fauberv.KemTransport&EquipmentCo., 876F.2d327,  
328(3dCir.1989).Rule238(a)(2)(ii)statesthatdamagesfordelayshallbeawarded“inan  
actioncommencedonorafterAugust1,1989,fromadateoneyearafterthedateoriginalprocess  
wasfirstservedintheactionuptothedateoftheaward,verdict,ordecision.”Owens-Corning  
wasservedwithacopyofComplaintonMarch14,1990,andGarlock,Inc.wasservedwitha  
copyoftheComplaintonMarch19,1990. SeeDef.OwensCorningResp.toPlaintiffs’Motion  
forDamagesforDelay,Ex.A;Def.GarlockResp.toPlaintiffs’MotionforDelayDamages,Ex.  
A.OnJuly23,1997,thejuryreturndaverdictinthedamagesphaseofthetrialof\$1,850,000:

\$250,000 for the Estate of Charles J. Greenleaf, Sr. and \$1,600,000 to Naomi Greenleaf. <sup>1</sup>On

July 25, 1997, the jury returned a verdict in the liability phase of the trial finding Owens-Corning and Garlock, Inc. liable, and judgment was entered against these defendants. The applicable total is \$250,000, and the potential period of delay damages runs from March 14, 1991 to July 25,

1997 for defendants Owens Corning and Garlock. See Pa. R. Civ. P. Rule 238(a)(ii). Rule

238(b) provides that delay damages shall exclude the period of time after which the defendant

has made a written offer of settlement or during which the plaintiff caused delay of the trial. See

Pa. R. Civ. P. 238(b)(1)-(2). Defendants made no written offer of settlement. <sup>2</sup>

Damages for delays shall be calculated at the rate “equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus one percent, not compounded.” Pa. R. Civ. P. 238(a)(3).

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1. Delay damages are not available for a loss of consortium claim, and plaintiffs have not requested delay damages for this aspect of the jury award. See Anchorstar v. Mack Trucks, Inc., 620 A.2d 1120, 1121-22 (Pa. 1993).

2. Owens Corning asserts that plaintiffs have delayed trial for not reinstating the case after Judge Weiner dismissed a number of cases without prejudice on October 15, 1993, pending the cases meeting the requirements of Giffey v. Johns-Mansville Corp., 632 A.2d 880 (Pa. Super. 1994), aff’d subnom. Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996) (holding pleural thickening absent disabling consequences is not a cognizable claim). This case was scheduled for a settlement conference on May 16, 1995 after petition from counsel, and the case was reinstated as active on June 12, 1997. Def. Owens Corning’s Resp., Exs. C, D. Delay caused by the judicial process does not affect the calculation of delay damages. See Kirk, 61 F.3d at 170. Owens Corning’s reliance on Babich v. Pittsburgh & New England Trucking Co., 563 A.2d 168 (Pa. Super. 1989) is misplaced, given the unique nature of asbestos litigation in this District. Cf. Kirk, 61 F.3d at 169 (failure to request a remand and failure to pursue exclusive state court litigation did not constitute delay by plaintiffs and should not preclude an award of delay damages).

The damages for delay are computed as follows:

1.3/14/91 to 12/31/91 (287 days at 103/4%), \$26,875 x 287/365:	<sup>3</sup>	\$21,131.85
2.1/1/92 to 12/31/92 (1 year at 7½%):		18,750.00
3.1/1/93 to 12/31/93 (1 year at 7%):		17,500.00
4.1/1/94 to 12/31/94 (1 year at 7%):		17,500.00
5.1/1/95 to 12/31/95 (1 year at 9½%):		23,750.00
6.1/1/96 to 12/31/96 (1 year at 9½%):		23,750.00
7.1/1/97 to 7/25/97 (206 days at 91/4%), \$23,125 x 206/365:	<sup>4</sup>	<u>13,051.37</u>
Total:		\$135,433.22

**BY THE COURT:**

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**MARVINKATZ, J.**

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3. The applicable percentage range for 1991 is 91/2% to 10%. See Addendum to Explanatory Comment to Pa. R. Civ. P. 238 (Supp. 1997). Plaintiff has used the 11% figure, while defendants Garlock and Owens Corning have asserted that the 101/2% figure applies. The court has applied the average of the two, or 103/4%. See, e.g., Cahoe v. Johnson, Civ. A. No. 90-7430, 1992 WL 204398, at 2 (E.D. Pa. Aug. 14, 1992). The court also notes that plaintiffs have misconstrued 238(a)(2)(ii) by beginning their calculations from the date of the filing of the complaint rather than from the date of service of process on defendants. See Def. Owens Corning Resp. to Plaintiffs' Motion for Damages for Delay, Ex. A; Def. Garlock's Opposition to Plaintiff's Motion for Delay Damages, Ex. A.

4. Plaintiffs have asserted that a 91/2% figure should be used, but defendants Owens Corning and Garlock claim that a 91/4% figure should be used, and the court agrees with the defendants. See Addendum to Explanatory Comment to Pa. R. Civ. P. 238.